

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1215

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

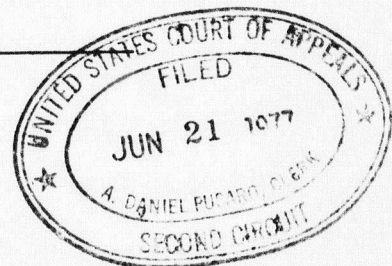
UNITED STATES OF AMERICA,
Appellee,

-against-

VICTOR ABRAHAM HOLMES,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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UNITED STATES OF AMERICA,

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-against-

VICTOR ABRAHAM HOLMES,

Appellant

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STATEMENT OF THE CASE

The appellant Victor Abraham Holmes was charged in a two count indictment with the crimes of attempted bank robbery (Title 18, United States Code, Sections 2113 (a) and 2) and assaulting a person by use of dangerous weapons while committing attempted bank robbery (Title 18, United States Code, Sections 2113 (d) and 2)

Upon a trial by jury, Mr. Holmes was convicted of both counts of the indictment, the Honorable Charles L. Brieant presiding. On April 11, 1977 Mr. Holmes was sentenced to a term of imprisonment of seventeen years on each count, to run concurrently.

The trial was preceded by a Miranda hearing concerning inculpatory statements by Mr. Holmes. No appellate issue is raised regarding this hearing.

At trial the government offered proof which tended to show that a branch office of the Banker's Trust bank, located at 116th Street and Madison Avenue in Manhattan, was the site of an attempted bank robbery on February 17, 1976 by three men, two of whom entered the bank with guns and, inter alia, shot a bank guard, and one of whom, the appellant Victor Holmes, remained in a car outside the bank.

Vincent Hicks testified that he committed the attempted bank robbery with the appellant and one Harry Santos-Figueroa (T:387, 404)*

Mr. Hicks stated that he knew Mr. Santos-Figueroa for about seven years (T:337) and that Mr. Santos-Figueroa introduced him to Mr. Holmes about three weeks before the attempted bank robbery (T:337-8). The weekend before the attempted bank robbery Mr. Hicks and Mr. Holmes discussed robbing the bank (T:343-6) and on Monday February 16, 1976, the day before the actual crime, Mr. Hicks and Mr. Holmes met and talked about committing the crime (T:358), at which time Mr. Holmes said he had a car to use in the crime (T:359).

Stipulated evidence showed that on February 16, 1976, Victor Holmes rented a car from Olin's Rent-A-Car at 234 East 85th Street, in Manhattan (T:66-68).

The next morning, February 17, 1976, Mr. Hicks spoke with Mr. Holmes on the phone at 9 A.M. (T:387) and fifteen minutes later Mr. Holmes and Mr. Santos-Figueroa came to Mr. Hicks' home (T:389). The men had woven hats (T:370). Mr. Santos-Figueroa

*The letter "T" with a numeral refers to a page of the trial transcript .

took a .32 calibre pistol and Mr. Hicks took a .38 calibre pistol and together, the three men got into Mr. Holmes' blue Nova automobile (T:397).

While Victor Holmes stayed in the car as planned, the two men with guns went into the bank (T:404) but were unsuccessful in actually robbing any money (T:405). Mr. Santos-Figueroa shot Mr. Winston Hill, a bank guard, while attempting to rob the bank (T:404).

Mr. Hill testified that he was working in uniform, heard the words 'stick up' and was then shot, after which he fell to the floor (T:36-38). He was taken to Metropolitan Hospital and remained there until March 4, 1976 (T:39). A Smith and Wesson .38 calibre gun issued to him by the bank was taken by one of the robbers (T:39-40).

Mr. Joseph Valentin, a vault attendant at the bank heard some noise and the words 'get down on the floor' (T:50). Mr. Valentin saw a gunman standing by Mr. Hill. The gunman took Mr. Valentin's .38 calibre bank-issued gun (T:50-51).

Juan Soto testified that he was a general cage teller at the bank which had just installed bullet-proof glass the previous week-end. He heard screaming, a shot, saw Mr. Hill lying on the floor and saw two men, one with a gun, leaving the bank. Mr. Soto pulled the alarm which activated the bank surveillance camera (T:56-57), which took over eighty photos of the men in the bank (T:61).

After Mr. Hicks and Mr. Santos-Figueroa left the bank

they got into Mr. Holmes' car (T:407). Mr. Holmes sped off and bumped into a lamp post and then finally crashed into two cars on East 120th Street (T:408-409). The three men ran out of the car and split up (T:412).

Detectives Frank Gilbert and Kenneth Pearson of the New York City Police Department, having received a police communication, were driving on East 120th Street looking for the blue Nova automobile and saw it crashed into two other cars (T:72-73), 106). The detectives saw a man running from the car (T:83, 110), caught him and it turned out to be Harry Santos-Figueroa. The detectives also recovered a .32 calibre pistol with one spent round (T:84).

Paul Ross, a practical nurse by profession, was outside on the grounds of the New York City Housing Authority building at Paladino Avenue near East 120th Street on February 20, 1976 when he saw a car crash and two men jump out of the car and run past (T:136-139). He also saw Victor Holmes there (T:141). Later he saw the police arrive and take one of the men, not the appellant, into custody (T:146).

Rachel Johnson testified that she lives at 445 East 120th Street and that on February 17, 1976 she heard a crash and went to her window (T:229). She came downstairs into the building lobby and saw there the appellant Victor Holmes (T:229-232). She knew Victor Holmes well, having seen him at least seventy-five times previously since a tenant on the ground floor was someone close to Victor Holmes and that person's children have played with Mrs. Johnson's children. Mr. Holmes was called 'uncle' by the children (T:233-234).

Detective Thomas Hallinan of the New York City Police Department testified that after speaking with Harry Santos-Figueroa who was in custody at the 25th Precinct, he went on the evening of February 17, 1976 to the home of Victor Holmes at 7 P.M. and arrested Mr. Holmes (T:278). After being placed under arrest Mr. Holmes said that he rented the blue Nova automobile and planned the bank robbery. Mr. Holmes identified a picture of Mr. Santos-Figueroa and further identified the recovered .32 calibre gun as that of Mr. Santos-Figueroa.

Mr. Hicks testified that he was arrested on March 8, 1976 while committing an unrelated bank robbery (T:416). Mr. Hicks pleaded guilty to the March 8, 1976 bank robbery and was sentenced to fifteen years imprisonment (T:329). He also pleaded guilty to the instant bank robbery and received a sentence of ten years, to run concurrently with the fifteen years (T:330). He has a motion to reduce his sentences pending and he hopes his testimony will favorably affect that motion (T:331).

The government rested (T:473) and later the defense did the same (T:487). Appropriate motions were made.

The jury rendered a guilty verdict on both counts (T:639).

POINT I

THE PROSECUTOR WRONGFULLY ELICITED PROOF FROM A COOPERATING WITNESS OF A PRIOR CRIME BY THE DEFENDANT; THIS EVIDENCE WAS ENTIRELY GRATUITOUS AND UNDULY PREJUDICIAL THEREBY DENYING THE NON-TESTIFYING DEFENDANT A FAIR TRIAL; THE DENIAL OF THE TIMELY MOTION FOR A MISTRIAL WAS ERROR.

The government's proof tended to show that the bank was robbed by three men, two of whom went inside the bank with guns and one of whom, with no gun, stayed outside in the car.

In this factual setting Vincent Hicks was the key prosecution witness against Mr. Holmes.* Mr. Hicks told the jury that he did in fact enter the bank with a gun, did attempt to rob the bank had pleaded guilty to this crime and had been sentenced. Mr. Hicks further testified that he was cooperating with the government in the hopes of receiving a reduction of sentence and that the cooperation was in the form of this testimony.

Mr. Hicks identified the appellant Victor Holmes as the man in the car. It is noted that no independent eye-witness identified Victor Holmes as the man in the car at the scene of the crime.

During Mr. Hicks testimony of events the day before the commission of the crime, he claimed that he met with Victor Holmes and the bank robbery was planned and discussed (T:357-8). He further stated that during this discussion he (Hicks) had a gun and Victor Holmes picked it up (T: 357-358).

At that point the assistant United States Attorney asked this cooperating witness (T:358):

*Harry Santos-Figueroa, the other gunman who entered the bank, did not testify.

"Q. When Mr. Holmes picked it up that day, was that the first time he ever had that particular gun of yours in his possession?

A. No, he borrowed it one time.

Q. Before that?

A. Yes.

The defendant's attorney promptly moved for a mistrial (T:362), referring (T:365) to this gratuitous testimony of an earlier crime, that is, possession of a weapon, on the grounds that this was unfairly prejudicial. The defendant's attorney recalled (T:362) that the Court had ruled at the outset of trial (T:26-33) that such testimony would not be allowed.

The Court reserved decision (T:367) until it had a chance to read the transcript.

The following morning the Court discussed the issue (T:371-378), noting that the testimony 'shows the commission of a separate felony' (T:373) and that the testimony has 'no bearing' on the issues at trial (T:374). The Court further stated that it was 'distressed' (T:375) by the testimony and that a 'strong argument' had been made for granting the motion (T: 377). Nevertheless the Court denied the motion (T:377,378) with a warning to the trial assistant (T:378).

It is respectfully submitted that the Court's ruling in denying the motion was in error and the motion should have been granted.

Any analysis of an issue such as this must begin with the premise that 'all evidence of other crimes is prejudicial'* and that 'everyone agrees that evidence of other crimes is most convincing.'**

*Weinstein and Berger, Weinstein's Evidence, Section 404(10), P404-70.

**Weinstein's evidence, supra, p. 404.41.

The danger is that the accused is denied a fair trial because evidence of another crime 'tends to confuse the issue of guilt or innocence of the specific offense charged and to weigh too heavily with the jury.' United States v. Ring, 513 F.2d 1001, at 1004 (6th Cir. 1975).

The prejudicial evidence of a separate crime was particularly acute to the appellant since he did not testify.

It is submitted that the Trial Court's ruling below may only be sustained if it can be justified on the basis of a balancing of the interests test, that is, a balancing of possible probative value opposed to possible unfair prejudice, such as must be made pursuant to Rules 403 and 404 (b) of the Federal Rules of Criminal Procedure.

Such a determination must be made on a case by case basis depending upon the particular factual setting, as has been noted by both Courts and commentators.*

Clearly where some probative value is served, then the prejudice flowing from proof of other crimes may be determined to have been properly offered into evidence.

The vice in the instant case however is that there was no probative value whatsoever to the testimony elicited by the trial assistant. While the testimony of Mr. Hicks as to his discussions about robbing the bank with Mr. Holmes the day before the robbery and as to Mr. Holmes picking up Mr. Hicks' gun momentarily at that

*See generally UNITED STATES v. BYRD, 352 F.2d 570 (2d Cir. 1965); UNITED STATES v. JOHNSON, 382 F.2d 280 (2d Cir. 1967); Payne, Jr. "The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases", 3 U. Rich. L. Rev. 62, 1968; Comment "Other Crimes Evidence at Trial: of Balancing and Other Matters", 70 Yale L.J. 763 (1961).

time may be seen as probative on the question of whether Mr. Holmes actually took part in the robbery, evidence that Mr. Holmes had possessed the gun at a time before any discussions or planning of this bank robbery were probative of nothing; rather it was unfair prejudice.

As the Trial Court below found, this evidence had 'no bearing' on the issues at trial (T:374). In short, using the test of balancing of the interests of probative value and unfair prejudice, there simply was no probative value in the setting below. The effect of the evidence was solely prejudicial to the appellant's right to a fair trial.

Moreover, it is submitted that it is significant that this prejudicial testimony was elicited by a direct question by the prosecutor to a cooperating witness after this very possibility was raised with this particular witness (T:26,27) and the Court ruled that such evidence should not be educed (T:26-33).

This evidence was not accidentally blurted out unknowingly by an impartial witness in the course of an unresponsive answer.

Under these circumstances, where there is no probative value to justify what is patently prejudicial evidence of another crime, and where the evidence was directly elicited by the prosecution from a cooperating witness, the motion for a mistrial should have been granted.

Finally it is submitted that if this Court finds error below, this error cannot be dismissed as 'harmless beyond a reasonable doubt' under CHAPMAN v. CALIFORNIA, 386 U.S. 18, 87 S. Ct. 824, 17 L Ed 2d 705 (1967). Without an extensive restatement of the

evidence at trial, it is noted that while there was voluminous prosecution proof at trial, no impartial eye-witnesses identified the appellant as having been at the scene of the crime and he was arrested at his home about ten hours after the crime had been committed.

Therefore it is respectfully submitted that in this case it was error to have denied the appellant's timely motion for a mistrial and this Court should reverse the conviction and remand the case for re-trial.

POINT II

THE SENTENCE IMPOSED, ALTHOUGH WITHIN STATUTORY LIMITS, WAS EXCESSIVE AND SHOULD BE MODIFIED.

The statutory maximum for the more grave of the two charges of which the defendant was convicted is twenty five years imprisonment. The defendant was sentenced to seventeen years imprisonment.

It is respectfully submitted that the sentence, although lawful, was excessive and should be modified.

It is conceded that this was a crime of violence and that there is a view of the evidence that supports the Trial Courts' conclusion that the appellant was the "leader" of this bank robbery (minutes of sentence page 6).

However, it is noted that Harry Santos-Figeroa, the bank robber who shot the guard, received a sentence pursuant to the "Youth Corrections Act" and that Vincent Hicks, who was originally sentenced to ten years imprisonment on this bank robbery and fifteen on an unrelated bank robbery, was re-sentenced (on the basis of cooperation with the government) shortly after the conviction on this case, to a term of seven years on each bank robbery, to run concurrently.*

It is respectfully submitted that the disparity of sentences (one receiving a "Youth Corrections Act" sentence; one receiving a seven year sentence for two unrelated bank robberies; this appellant receiving seventeen years) among the three parti-

* Assistant U.S. Attorney Ira Bloch informed counsel of these sentences.

cipants in this bank robbery is excessive and arbitrary and warrants this Court modifying the sentence imposed upon the appellant.

CONCLUSION

The judgment of conviction of the appellant Victor Abraham Holmes should be reversed; if the conviction is left standing, the sentence imposed should be modified.

Respectfully submitted,

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